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In The
Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,
Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of California

BRIEF OF *AMICUS CURIAE* THE CHURCH OF THE GOOD SHEPHERD IN SUPPORT OF PETITIONERS

PAUL F. DANELLO
Counsel of Record
BAKER & DANIELS LLP
1050 K STREET NW, STE. 400
WASHINGTON, DC 20001
(202) 312-7440

MICHAEL F. RUGGIO
ROETZEL & ANDRESS LPA
1300 EYE STREET NW
SUITE 400 EAST
WASHINGTON, DC 20005

JOHN R. SCHAIBLEY, III
BAKER & DANIELS LLP
300 NORTH MERIDIAN STREET
SUITE 2700
INDIANAPOLIS, IN 46204

JOHN J. SCHRINER
ROETZEL & ANDRESS LPA
1375 E. NINTH STREET
ONE CLEVELAND CENTER, 9TH FL.
CLEVELAND, OH 44114

Counsel for Amicus Curiae

July 24, 2009

Becker Gallagher · Cincinnati OH · Washington, D.C. · 800.890.5001

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Memorial Church of the Good Shepherd ("Good Shepherd"), is a Pennsylvania nonprofit corporation that has been a parish of The Episcopal Diocese of Pennsylvania ("the Diocese") since 1870. Good Shepherd's original 1870 charter remains today as its governing document and has been amended only once, in 1907, to change its corporate name. Since its 1870 foundation, Good Shepherd's property has been titled solely and exclusively in its own name apart from a period beginning in 1910, when Good Shepherd granted and conveyed the property to trustees for the Diocese, who, in 1967, granted and conveyed all the property back to Good Shepherd. Good Shepherd's property has remained titled solely and exclusively in its own name since the Diocese's reconveyance.

On February 19, 2009, the Diocese filed an action in Pennsylvania state court to claim Good Shepherd's real and personal property, asserting that the property "is held in trust for the Episcopal Church and the Diocese" on the basis of internal church canons and constitutions unilaterally adopted by those bodies, declaring that the local congregation holds its property in trust for the national church hierarchy. These

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief, and the parties have consented to its filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

church canons and constitutions were adopted *after* Good Shepherd obtained title to its property. Ultimately, the state court action against Good Shepherd arises from the Diocese's decision in 2002 to inhibit the sacramental and spiritual ministrations of the incumbent rector of Good Shepherd and to depose him as pastor in consequence of doctrinal, ecclesiological, and canonical disputes between the parties regarding: priestly and episcopal ordination, clerical status, and religious vows; ecclesiastical authority and spiritual jurisdiction; exercise of priestly and episcopal faculties and pastoral direction; acquisition, holding, and loss of ecclesiastical office; and abandonment *vel non* of religious communion with the Episcopal Church.

Many of the same or similar church canons and constitutions upon which the Diocese is basing its claim of ownership of Good Shepherd's property in the Pennsylvania case, are now at issue in the case before this Court. Accordingly, this case presents several important constitutional issues that will largely, if not entirely, determine the disposition of material aspects of Good Shepherd's case.

INTRODUCTION AND SUMMARY OF ARGUMENT

While church property disputes implicate both of the Religion Clauses, this Court's case law on the subject developed primarily by building on itself, rather than explicitly drawing upon broader Establishment Clause and Free Exercise Clause cases. This Court's last pronouncement on church property disputes, *Jones v. Wolf*, 443 U.S. 595 (1979), a thirty-year-old 5-4 decision, was the culmination of this fairly

insular body of case law. There has been considerable development of doctrine under the Religion Clauses since *Jones*, and the questions presented by this case provide an excellent vehicle for the Court to perfect its church property dispute doctrine and to synthesize and refine Religion Clauses jurisprudence.

While *Jones* strongly endorsed a neutral principles of law approach to judicial resolution of church property disputes, courts have read it to continue to permit a very different approach: judicial deference to the religious governance documents of churches organized in a particular fashion, even where the church documents solely address secular property issues. Such judicial deference: offends both of the Religion Clauses; is inconsistent with this Court's continuing trend toward applying neutral principles of law; and raises Equal Protection issues as well.

The fundamental constitutional issue is whether the proper standard for resolving church property disputes is that of "neutral principles of law" or that of "deference to hierarchical church governance." The hierarchical deference standard is often chimerical since many denominations are hybrid organizations, bearing both congregational and hierarchical characteristics. Under the hierarchical deference approach, hybrid organizations, such as the Episcopal Church, often require civil courts to make complex ecclesiological and theological judgments on various different entities in denominational organizations, which violates the First Amendment.

In this case, as in Good Shepherd's own case, the Episcopal Church characterizes itself as hierarchical – and, in fact, the ultimate ecclesiastical hierarchy –

while, on the one hand, claiming to be part of the Anglican Communion and, on the other hand, simultaneously deemphasizing its hierarchical nature in clergy sexual abuse cases. Is the Episcopal Church hierarchical? If so, to which member of the hierarchy should the courts defer: the parish, the diocese, the national denomination, or the worldwide Anglican Communion?

The hierarchical deference standard also violates the Establishment Clause by requiring judicial deference to decisions of religious hierarchical organizations, which deference is not accorded to similar acts of secular voluntary associations. Church canons and constitutions imposing unilaterally created trusts should not abrogate state trust law, which requires that a settlor – not a beneficiary – manifest its intent to create a trust in a written instrument. Similarly, church hierarchies should not be exempt from state law requirements for creating and recording property interests that apply to secular voluntary associations. By elevating the Dennis Canon over clear record title and basic state trust law, the California Supreme Court assumed what was in dispute – namely, the Episcopal Church's doctrinal contention that it was a purely hierarchical church and thus "superior" or "general" under Section 9142(c) of the California Corporations Code.

Apart from the fundamental conceptual deficiencies of the hierarchical deference standard, application of the hierarchical deference and neutral principles of law standards has produced abundant confusion among state courts about what the Constitution mandates, permits, or forbids in church property

disputes.[2] The interplay between this Court's decisions in *Jones*, on the one hand, and *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), and *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871), on the other, has caused confusion over whether deference to the decision rendered by the highest church judicatory to which it was presented in a hierarchical church is mandatory, or, whether civil courts can apply neutral principles even if the church is recognized to be hierarchical. The inconsistency between the Pennsylvania Supreme Court's decisions in *The Presbytery of Beaver-Butler of the United Presbyterian Church of the United States of America v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317 (1985), and *In re Church of St. James the Less*, 585 Pa. 428, 888 A.2d 795 (2005), illustrates the confusion that has occurred throughout the rest of the country. And the California Supreme Court's decision below reflects that same confusion, as the court adopted a neutral principles approach in name, but applied a hierarchical deference standard in practice, giving the force of law to an ecclesiastical edict that permits a non-owner to gain control of property by simply declaring a trust interest for itself in the property in contravention of the owner's vested rights.

The neutral principles standard should not, and cannot, be viewed as an open-ended invitation to courts to peruse and weigh, as they deem fit, church

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[2] In their Petition for Writ of Certiorari ("Petition"), Petitioners detail the various decisions reached by state courts as to which standards they will, and/or believe to be constitutionally compelled to, apply in church property disputes. (Petition at 25-35.)

canons, constitutions, and other doctrinal documents in church property disputes. In order to avoid such unconstitutional forays into ecclesiastical issues, courts should first consider only secular documents, such as trusts, deeds, and statutes. Only if those secular documents are unclear should courts consider ecclesiastical documents, even when such documents contain provisions governing the use of church property.

This case presents a paradigm of the very sort of religious quagmire that the Religion Clauses were designed to shield from even the perception of government involvement, entanglement, or preference. An exercise of religious freedom – St. James Parish's disaffiliation from the Episcopal Church due to a doctrinal dispute – spawned this property dispute. The question is whether the local church will lose its vested property rights under circumstances in which a non-religious voluntary association could not lose its rights.

Significantly, the underlying doctrinal dispute has, at its core, the most divisive of political issues, particularly in California, where the citizens of California recently overturned a decision of the California Supreme Court in a highly polarizing, narrowly adopted state referendum. Failure to apply generally applicable principles of property law to such a religiously charged dispute: causes the government to take sides in a religious dispute; has a chilling effect on the free exercise of religion of members of certain denominations; lends state aid to hierarchical churches; violates the command of government neutrality; negates secular law by rubber-stamping ecclesiastical fiat; and fosters religiously based social

divisiveness. St. James Parish has the right to the equal protection and neutral application of generally applicable secular law, and the holding below must now be reviewed and reversed in order to protect that right.

ARGUMENT

I. The Church Property Dispute Cases

In *Watson*, this Court formulated the hierarchical deference rule for judicial resolution of church property disputes, grouping church property rights into three categories and holding that: (1) express language in the instrument by which church property is held would be judicially enforced; (2) in cases of a schism in a congregational church, the congregation's decision concerning property rights would be judicially enforced; and (3) in cases of a schism in a hierarchical church:

> [W]henever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of [the] church [adjudicatory tribunals] to which the matter has been carried, the legal tribunals must accept such decisions as final . . . and as binding on them. . . .

Id. at 727. In *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952), the Court "converted the principle of *Watson* . . . into a constitutional rule." *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440, 447 (1969).

Hull involved a property dispute arising from a schism in a member church of the Presbyterian Church in the United States ("PCUS"). The Georgia Supreme Court, in affirming a decision awarding the property to the local church as represented by the majority faction which had voted to withdraw the church from PCUS, held that PCUS's departure from its doctrine could terminate its implied trust in the local property notwithstanding PCUS's claim of ownership. *See Presbyterian Church in the United States v. Eastern Heights Presbyterian Church*, 224 Ga. 61, 68, 159 S.E.2d 690, 695 (1968). This Court reversed, holding that:

> [T]he departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion – the interpretation of . . . doctrines and [their] importance . . . to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.

Hull, 393 U.S. at 450. However, this Court clarified that, "not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment . . . there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* at 447, 449.

In *Maryland and Virginia Eldership of the Churches of God v. The Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970) (*per curiam*), the Court sanctioned the examination of deeds, corporation charters, state statutes, and provisions of a church's

constitution pertinent to the ownership and control of church property to resolve a church property dispute.

In *Milivojevich,* the Court held that:

> [T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over those matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

Id. at 724-25. Justice Rehnquist's dissent, joined by Justice Stevens, rejected the notion that *Watson* represents a constitutional rule and explained:

> To make available the coercive powers of civil courts to rubber-stamp ecclesiastical decisions of hierarchical religious associations, when such deference is not accorded similar acts of secular voluntary associations, would, in avoiding . . . free exercise [clause] problems . . . create far more serious problems under the Establishment Clause.

Id. at 734 (Rehnquist, J., dissenting). Pointing out that, "the government may not displace the free religious choices of its citizens by placing its weight behind a particular religious . . . sect," *id.* at 733, the dissent warned:

> If the civil courts are to be bound by any sheet of parchment bearing the ecclesiastical seal and purporting to be a decree of a church court, it can easily be converted into handmaidens of arbitrary lawlessness.

Id. at 727.

Jones v. Wolf, 241 Ga. 208, 243 S.E. 2d 860 (1978), involved a church property dispute between two factions of a PCUS church. The Georgia Supreme Court affirmed the lower court's ruling awarding local church property to the majority faction which had voted to withdraw the church from PCUS, notwithstanding the judgment of a PCUS organ that the minority faction constituted the church's congregation. *See* 241 Ga. at 210, 243 S.E.2d at 862.

In *Jones*, this Court approved the Georgia Supreme Court's approach of applying neutral principles by examining deeds to church property, statutory sources, and provisions of the church's constitution concerning the ownership and control of church property. Endorsing the neutral principles approach, the Court explained:

> [T]he method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity and practice....Through appropriate reversionary clauses and trust provisions, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious party will

> determine the ownership in the event of a schism or doctrinal controversy.

Jones 443 U.S. at 603. The Court further recognized that it is "the 'obvious duty' of a civil tribunal to enforce the 'express terms' of a deed, will, or other instrument of church property ownership." *Id.* at 603, n.3 (quoting *Watson,* 80 U.S. at 722-23).

In 1979, in response to *Jones*, the Episcopal Church adopted Canon I.7.4 ("the Dennis Canon"), which provides that:

> All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

In the years following *Jones*, courts have reviewed the meaning and effect of the Dennis Canon on church property disputes, and as noted below, they have reached conflicting determinations.

A crucial distinction exists between religious disputes, the outcomes of which determine property interests, and property disputes merely involving religious factions. *See Milivojevich*, 426 U.S. 709 (finding that, where the control of the property was

determined by the religious dispute over a defrockment, "this case essentially involves not a church property dispute, but a religious dispute the resolution of which under our cases is for ecclesiastical and not civil tribunals"). The Court has applied *Watson* to reverse judgments which have grappled with ecclesiastical questions – hence the results in *Kedroff* and *Milivojevich* (and the striking down of the departure-from-doctrine element in *Hull).* However, when confronted with the property disputes involving religious factions in *Hull*, *Sharpsburg*, and *Jones*, the Court reacted with the neutral principles of law approach.

While *Jones* endorsed the neutral principles of law approach, given that courts subsequently have read it to endorse some deference to certain hierarchical church documents, even when those documents relate solely to secular property issues, it has failed to bring appropriate clarity to this area of the law. Courts have varied widely in their application of that standard. An illustrative example can be found in comparing *Beaver-Butler* and *St. James the Less*, two cases in which the Pennsylvania Supreme Court reached remarkably different results based upon reviews of very similar factors under a neutral principles approach. *Beaver-Butler* involved a property dispute between the PCUS and members of a local church that had disaffiliated from the PCUS. In determining whether the PCUS had a trust interest in the property of the local church, the court approved of, and applied, a neutral principles of law approach. *See Beaver-Butler*, 507 Pa. at 266, 489 A.2d at 1323. Upon review of the deeds, local church charter provisions, and PCUS constitutional provisions, including its amendment unilaterally creating a trust interest for itself in the property of its

affiliated churches, the court ultimately ruled in favor of the local church, finding that there was "no evidence that [the local church] ever intended to convey [its] property interest to [PCUS]," which is an essential requirement for a valid trust under secular trust law. 507 Pa. at 269, 489 A.2d at 1325.

St. James the Less involved a similar property dispute between a local Episcopal church and the diocese, which dispute arose in the wake of the local church's disaffiliation from the Episcopal Church. As in *Beaver-Butler*, the *St. James the Less* court applied a neutral principles of law standard in determining whether the Episcopal Church had a trust interest in the property that was titled to the local church. However, despite considering deeds, local church charter provisions, and national church constitutional provisions that were similar to those reviewed by the court in *Beaver-Butler*, the court reached the opposite conclusion – that there was sufficient evidence to conclude that the local church *had* intended to place its property in trust for the diocese. *See St. James the Less*, 585 Pa. at 452, 888 A.2d at 809. In her dissenting opinion, in which she concluded that, "I am unable to accept [the majority's] determination that [the] property is subject to a trust interest in favor of the Diocese," Justice Newman noted the inconsistency of the majority's opinion with both: (1) the approach the court had previously taken in *Beaver-Butler*; and (2) the well-settled principles of Pennsylvania trust law, which are properly focused upon the intent of the settlor – not the beneficiary. 585 Pa. at 459, 888 A.2d at 814 (Newman, J., dissenting).

Clearly, this level of confusion and/or inconsistency within the same court – let alone amongst courts

around the country – evidences the need for this Court to further expound upon the neutral principles of law approach.

II. Some Guiding Principles of the Religion Clauses

Doctrine under the Religion Clauses has evolved considerably since the church property dispute cases were decided. The Court's Free Exercise Clause cases have moved from the compelling state interest purpose or effect test analysis of *Sherbert v. Verner,* 374 U.S. 398 (1963), to the purpose driven test of *Employment Division v. Smith*, 494 U.S. 872 (2005). This Court's understanding of the Establishment Clause has been on a trajectory from a wall of separation concept to one of non-preferentialism and a correlative avoidance of entanglement that pragmatically would spawn social divisiveness.

In *Employment Division*, the Court held that religious institutions are required to conform their conduct to generally applicable laws unless the government's motive or intent is to impede religion. The Court, citing the church property dispute cases, observed that under the First Amendment, the government may not "lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division*, 494 U.S. at 877. The Court explained that neutral laws of general applicability are binding irrespective of religious beliefs: "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79.

To permit religious doctrine to be superior to the otherwise applicable law of the land would "in effect permit every citizen to become a law unto himself." *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1978)); *see also United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Free Exercise Clause does not relieve religious adherent of obligation to comply with "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)") (Stevens, J., concurring).

A fundamental principle underlying both of the Religion Clauses is the concept of government neutrality. *See McCreary County, Ky. v. ACLU*, 545 U.S. 844, 875-76 (2005). This principle is especially salient in deciding controversies arising out of disputes between religious organizations and their members. Significantly, government neutrality is as much a question of perception as one of fact. The interrelated concept of "equal treatment" has also been a unifying thread in Religion Clause cases: "the Religion Clauses – the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion – all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part).

Moreover, government actions which are reasonably viewed as favoring a particular form of religion foster a divisiveness in contravention of the Religion Clauses. *See Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J. concurring) ("[The Religion

Clauses] seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike").

III. The Religion Clauses Require Church Property Rights to be Governed Solely by Generally Applicable Property Law

In the case below, the California Supreme Court, purportedly applying neutral principles of law under *Jones* to resolve a church property dispute, instead applied a hierarchical deference standard, pursuant to which it allowed a self-serving internal church rule (the Dennis Canon) and a state statute (Section 9142 of the California Corporations Code) to confer a special power on certain types of religious organizations to divest associated members of their vested property rights. As detailed below, this result raises many constitutional concerns that warrant this Court's attention and action.

In this case, it was an exercise of religious freedom – the disaffiliation of a parish from a general church for doctrinal reasons – that spawned this church property dispute. The question is whether the parish will lose vested property rights as a result of its exercise of religious freedom under circumstances in which a non-religious organization would not, and could not, be divested of its rights. To permit the state in this case to favor the general church by conferring upon it unique powers to declare a trust interest for its own benefit on property of an affiliated member: lends state aid to the establishment of hierarchical churches; violates the command of government neutrality under the Establishment Clause; interferes with the free exercise of religion of the members of such

denominations; and would foster religiously based social divisiveness.

The court below lent the power of the state to a church hierarchy by effectuating a state statute providing an express exception from generally applicable property law to enforce "the governing instruments of a superior religious body or general church . . . ." California Corporations Code § 9142(c). A more direct attempt to aid and strengthen a religious hierarchy would be difficult to imagine. Excusing the church from "compliance with . . . otherwise valid [property] law" permits the governing religious body to "become a law unto [itself]." *Employment Division*, 494 U.S. at 879. Moreover, judicial enforcement of the statute makes available "the coercive power of civil courts to rubber-stamp" the Dennis Canon, when such deference is not accorded similar acts of secular voluntary organizations. *Milivojevich*, 426 U.S. at 734 (Rehnquist, J., dissenting). While "one's religion ought not affect one's legal rights," *Grumet*, 512 U.S. at 715 (O'Connor, J., concurring in part), in California, one's religion not only affects one's property rights, it determines them by ecclesiastical fiat.

Moreover, the California Supreme Court's interpretation of Section 9142 sanctioned the very judicial action that this Court has prohibited as unconstitutional. More specifically, under the California Supreme Court's interpretation of Section 9142, a court must first determine whether a religious organization is a "superior religious body or general church." California Corporations Code at § 9142(c)(2). If the court determines that the organization is "superior" or "general," it will then defer to that

organization's "governing instruments" regarding the secular issue of property ownership. *Id.* Where, as here, the hierarchy of the church is disputed, such judicial involvement in determining the structural nature of religious entities has long been condemned as requiring "a searching and therefore impermissible inquiry into church polity." *Jones*, 443 U.S. at 605 (quoting *Milivojevich*, 426 U.S. at 723); *see also Sharpsburg*, 396 U.S. at 369 (Brennan, J., concurring) ("To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment").

With further regard to this issue, categorizing churches as "congregational" or "hierarchical" with respect to property matters only confuses the analysis. The hierarchical deference standard is often chimerical because many denominations, like the Episcopal Church, are hybrid organizations, bearing both congregational and hierarchical characteristics. Such hybrid organizations often require civil courts to make complex ecclesiological and theological judgments on intra-denominational organization, which are constitutionally forbidden. *See id.*

The California Supreme Court clearly allowed the Episcopal Church's self-serving Dennis Canon to trump the neutral principles of law that it was purportedly applying. "No principle of trust law exists that would allow the unilateral creation of a trust by the declaration of a nonowner of property that the owner of the property is holding it in trust for the nonowner." *Episcopal Church Cases*, 45 Cal.4th 467, 495, 198 P.3d 66, 86 (2009) (Kennard, J., concurring and dissenting). The decision of the court below flies

in the face of "well-established concepts of trust and property law," upon which the neutral principles of law approach is based, *Jones*, 443 U.S. at 603, and which require that a valid trust for real estate must be in writing, signed, and reflect the intention of the settlor (here, St. James Parish) to create a trust. *See* California Probate Code §§ 15201 ("A trust is created only if the settlor properly manifests an intention to create a trust"), 15206 (setting forth the principles of the Statute of Frauds). By validating the Episcopal Church's unilaterally-created trust interest, the decision of the court below failed to "reflect the intentions of the parties," which this Court has recognized as one of the primary benefits of the neutral principles of law approach, *Jones*, 443 U.S. at 603, and it excused certain religious organizations from the generally applicable secular law requiring that property interests be validly recorded.

In conferring upon certain religious organizations this otherwise-unheard-of right to unilaterally create trust interests for themselves in the property titled to others, the California Supreme Court gave preference to those religious organizations over not only other religious organizations, but also secular organizations, in direct contravention of the Establishment Clause and the Equal Protection requirement that the state "govern impartially." *Craig v. Boren,* 429 U.S. 190, 211 (1976) (Stevens, J., concurring); *see also Grumet*, 512 U.S. at 748 (Scalia, J., dissenting) ("the Establishment Clause prohibits the favoring of one religion over others").

The decision below and its hierarchical deference standard further violate the Establishment Clause and the Equal Protection Clause by requiring judicial

deference to decisions of religious hierarchical organizations on secular issues that is not accorded to similar acts of secular voluntary associations. Under the law applicable to secular voluntary associations:

> [A] member of a voluntary association is bound by amendments to the association's rules so long as the amendments (1) are duly enacted; and (2) *do not deprive the member of vested property rights without the member's explicit consent.*

St. James the Less, 585 Pa. 428, 448, 888 A.2d 795, 807-808 (emphasis added). *See generally*, Z. Chafee, *The Internal Affairs of Associations Not For Profit*, 43 Harvard Law Review 993 (1930) (outlining the analytic approaches to disputes involving voluntary non-profit organizations).[3]

Had it been properly and neutrally applied to the case at bar, this law would have prohibited the Dennis Canon from depriving St. James Parish of its vested property rights. St. James Parish, a religious corporation, was deeded the property in question in fee

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[3] With respect to secular voluntary associations, the general rule permitting the association to amend its governing charter is "subject to the limitation that the right cannot be exercised in such a way as to work a forfeiture or impairment of rights previously vested in its members." 6 Am. Jur. 2d *Associations and Clubs*, § 9 at 400; 7 C.J.S. *Associations*, § 6 at 33 (By-laws of an association may be amended provided the amendment does not destroy "vested rights"). Many courts have espoused the principle that courts may intervene in the affairs of a private organization only where property rights or pecuniary interest is at stake. *See NAACP v. Golding*, 342 Md. 663, 675, 679 A.2d 554, 560 (1996).

simple absolute, and it is the record title holder. If it had been the intention of the parties for St. James Parish to relinquish the property if it ever disaffiliated with the Episcopal Church, it would have been an easy matter to convey a fee simple determinable, but that was not done.

To that end, the Catholic Church, often considered to be the hierarchical church *par excellence*, in fact not only requires that ownership of goods belongs to that specific juridic person which has legitimately acquired them[4], whether diocese, parish, or other public juridic person, but also mandates[5] that civil law implementation of such ownership be effected.[6] Consequently, if denominations want to maintain control over local church property, they can do so in the manner of all other entities, secular and religious, including the Catholic Church, by creating documents

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[4] c. 1256 of *Corpus iuris canonici* ("*CIC* 1983") as promulgated by Pope John Paul II in the Apostolic Constitution *Sacræ disciplinæ leges*. *See Acta Apotolicæ Sedis* 75/II [1983] VII-XIV, providing (in translation from the Latin): "Under the supreme authority of the Roman Pontiff, ownership of goods belongs to that juridic person which has acquired them legitimately."

[5] c. 22 of *CIC* 1983: "Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise."

[6] c. 1290 of *CIC* 1983: "The general and particular provisions which the civil law in a territory has established for contracts and their disposition are to be observed with the same effects in canon law insofar as the matters are subject to the power of governance of the Church unless the provisions are contrary to divine law or canon law provides otherwise, and without prejudice to the prescript of can. 1547."

that clearly identify their ownership interests, either at the time of purchase or at a later time by agreement with party holding title. Here, the Episcopal Church did not do so. The Episcopal Church has no secular right of reverter, and under generally applicable property and trust law, it could not create one by its own later declaration that St. James Parish was holding the property in trust. St. James Parish is the record title owner of the property; neither courts nor title searchers should be in search of a canonical degree to the contrary.

In addition to the various Establishment Clause and Equal Protection concerns addressed above, the California Supreme Court's decision also raises significant Free Exercise Clause concerns. More specifically, by failing to apply "valid and neutral laws of general applicability," *Employment Division*, 494 U.S. at 879, and by rendering the preferential decision it did, the court below interfered with the deliberate choice of the local congregation to affiliate for ecclesiastical purposes, but not for other purposes, including property ownership. This conclusion is especially warranted where, as here, the local congregation incorporated itself in order to secure its property rights. Furthermore, the decision below inexcusably interfered with the Free Exercise rights of individual members and donors, whose intended gifts to the local incorporated church can now unilaterally be usurped by the national church via ecclesiastical fiat.

The holding below is particularly problematic given the politically charged nature of the doctrinal dispute that led to St. James Parish disaffiliating with the Episcopal Church. The subject matter of the doctrinal

dispute is the elephant in the room. The underlying doctrinal dispute has, at its core, political issues that are among the most divisive in contemporary politics, and particularly divisive in the State of California. The citizens of California just recently overturned a California Supreme Court's decision on gay rights in a highly polarizing, narrowly adopted statewide referendum. A basic principle of the Religion Clauses is to avoid social divisiveness based on religion. *See Van Orden*, 545 U.S. at 698 (Breyer, J., concurring). In this case, however, the California Supreme Court permits a hierarchical church, because it claims to be a hierarchical church, unilaterally to divest a parish of property after the parish leaves the church in protest over intensely politically charged issues – issues that themselves had been a source of friction between the court and the citizenry of California. Judicial intervention into such a religious-political morass is the very sort of state interference that the Religion Clauses were designed to prevent.

In light of the foregoing serious constitutional concerns raised by the decision below and the inconsistency with which the neutral principles approach has been employed by courts throughout the country, Good Shepherd respectfully submits that it is necessary for this Court to grant the pending Petition and to expound upon the neutral principles approach that it last discussed, and encouraged, thirty years ago in *Jones*. This case offers this Court the opportunity to continue to strengthen and synthesize its Religious Clause emphases on equal treatment and the neutral application of generally applicable laws.

To that end, Good Shepherd, like Petitioners, urges this Court to consider the neutral principles approach

adopted by the Supreme Court of New Hampshire in *Berthiaume v. McCormack*, 153 N.H. 239, 891 A.2d 539 (2006). In *Berthiaume*, the court adopted a neutral principles approach for the resolution of church property disputes, pursuant to which:

> [W]e will first consider only secular documents such as trusts, deeds, and statutes. Only if these documents leave it unclear which party should prevail will we consider religious documents, such as church constitutions and by-laws, *even when such documents contain provisions governing the use or disposal of church property.*

153 N.H. at 248, 891 A.2d at 547 (emphasis added). Not only does such a neutral principles approach protect against unconstitutional court entanglements in doctrinal and ecclesiological issues, but it also comports with well-established generally applicable secular law governing property disputes, which provides that courts may consider extrinsic evidence to determine the parties' intent "only if the language of the relevant documents contains either patent or latent ambiguity." *Id.*

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

Paul F. Danello
Counsel of Record
BAKER & DANIELS LLP
1050 K Street NW
Washington, DC 20001

John R. Schaibley, III
BAKER & DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204

Michael F. Ruggio
ROETZEL & ANDRESS LPA
1300 Eye Street NW
Suite 400 East
Washington, DC 20005

John J. Schriner
ROETZEL & ANDRESS LPA
1375 E. Ninth Street
One Cleveland Center, 9th Floor
Cleveland, Ohio 44114